

1 Rene L. Valladares
2 Federal Public Defender
3 Nevada Bar No. 11479
4 Benjamin A. Gerson
5 Assistant Federal Public Defender
6 New York State Bar No. 5055144
7 Benjamin_gerson@fd.org
8 411 E. Bonneville Ave., Ste. 250
9 Las Vegas, NV 89101
10 (702) 388-6577
11 (702) 388-5819 (fax)

7 Attorney for Defendant
DAVID NUNN

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v

DAVID NUNN

Defendant.

Case No. 6:20-PO-00742-HBK

**NOTICE OF MOTION AND
MOTION FOR EVIDENTIARY
HEARING IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS.**

Hon. Helena Barch-Kuchta

1 **TO: SEAN ANDERSON, YOSEMITE NATIONAL PARK LEGAL**
2 **OFFICER PLEASE TAKE NOTICE** that as soon as this matter can be heard
3 before the Honorable United States Magistrate Judge Helena Barch-Kuchta,
4 Benjamin A. Gerson, Assistant Federal Defender, counsel for the defendant, David
5 Nunn, hereby moves the court to grant an evidentiary hearing to supplement the
6 record by means of documentary evidence and live testimony in support of
7 defendant's motion to dismiss.

8
9 Dated: February 15, 2023

10 Rene L. Valladares
11 Federal Defender
12 */s/ Benjamin A. Gerson*
13 BENJAMIN A. GERSON
14 Assistant Federal Defender
15 Attorney for Defendant
16 David Nunn
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1 **I. Introduction**

2 On April 27, 2021, defendant David Nunn moved this court to dismiss the
3 complaint alleging that Mr. Nunn violated 36 C.F.R. § 2.17(a) on the basis that the
4 regulation banning BASE jumping in Yosemite National Park is arbitrary and
5 capricious. *See ECF No. 18.* The government opposed. The court heard oral
6 argument and ordered supplemental briefing. Most recently the court heard a
7 second oral argument on February 6, 2023¹. During that argument, the court raised
8 concerns about the evidentiary record supporting Mr. Nunn’s motion to dismiss.

9 The instant motion addresses the court’s concerns about the evidentiary
10 record as it pertains to Mr. Nunn’s second claim. In that claim, Mr. Nunn pleaded
11 that Yosemite National Park’s ban and enforcement of BASE jumping is arbitrary
12 and capricious under *Overton Park v. Volpe*, 401 U.S. 402 (1971). Specifically,
13 Yosemite National Park’s decision to enforce a strict ban on BASE jumping is
14 arbitrary as a matter of agency decision making. As detailed in the motion to
15 dismiss, the park allows similar activities such as hang gliding. *See ECF No. 18 at*
16 17. Documentary evidence proffered in the motion to dismiss demonstrates a clear
17 animus toward the sport, undermining the presumption of regularity afforded to
18 agency decision making. *See ECF No. 18 at 4.*

19 At the February 6, 2023, hearing the court expressed concerns that Mr.
20 Nunn’s documentary proffers were not properly part of the evidentiary record. In
21 addition, the court expressed concern that the current availability of permits for

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23 ¹ The prior procedural history of Mr. Nunn’s motion to dismiss is detailed at
ECF No. 43 at 1.

1 BASE jumping in Yosemite National Park is unclear. Broad permitting allowances
2 set forth in the Yosemite Compendium² conflict with widespread accounts of permit
3 denials in the BASE jumping community. *See* ECF No. 18 at 4. Mr. Nunn now
4 moves the court to expand the evidentiary record by means of documentary
5 evidence and live testimony at an evidentiary hearing to resolve these factual
6 issues.

7 **II. Evidentiary Development is Necessary.**

8 **A. Evidentiary development is necessary under *Overton Park*.**

9 In *Overton Park*, the Supreme Court expressly authorized reconstruction of
10 the administrative record by means of an evidentiary hearing and remanded to the
11 District Court. *Overton Park*, 401 U.S. at 419–420. Because Yosemite National
12 Park did not engage in formal rulemaking or adjudication in determining the
13 enforcement priorities surrounding BASE jumping, reconstruction of the
14 administrative record is essential. While *Overton Park* contemplated an evidentiary
15 hearing to supplement a “bare record”, *Id.* at 420, the instant case has even less
16 than a “bare record.” The government has not adduced any information to refute
17 Mr. Nunn’s allegations that the enforcement of BASE jumping was arbitrary. The
18 court should grant an evidentiary hearing to establish the administrative record
19 surrounding BASE jumping enforcement policies.

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23 ² Available at: <https://www.nps.gov/yose/learn/management/lawsandpolicies.htm>

1 **B. Evidentiary development is necessary under *San Francisco*
2 *Herring*.**

3 Evidentiary development is necessary to clarify Yosemite National Park's
4 enforcement posture under *San Francisco Herring*, 946 F.3d 564, 577–578 (2019).
5 The Yosemite Compendium appears to provide for permit opportunities for BASE
6 jumping in the park. However, the long-standing consensus in the BASE jumping
7 community is that Yosemite National Park will not issue a BASE jumping permit
8 under any circumstances. *See* ECF No. 18 at 4. If true, the long term refusal to issue
9 a permit constitutes final agency action subject to judicial review. *San Francisco*
10 *Herring* provides a clear test for final administrative action and the futility of
11 pursuing unavailable administrative remedies. *Id.* at 577–578. Because the
12 government's opposition rests in part on the requirement to exhaust administrative
13 remedies before challenging the underlying regulation, this court should grant an
14 evidentiary hearing to clearly establish the park's permitting, appeals, and
15 enforcement policy surrounding BASE jumping.

16 **C. Evidentiary development is necessary because of a
17 material dispute of fact.**

18 Because the resolution of a material issue of fact would entitle Mr. Nunn to
19 relief, this court should hold an evidentiary hearing. *U.S. v. Irwin*, 612 F.2d 1182,
20 1887 (1980) (“If, in fact, a material issue of fact were raised which if resolved in
21 accordance with appellant's contentions would entitle him to relief, an evidentiary
22 hearing would be required”) (internal quotation and parentheses omitted).

23 Whether Mr. Nunn is entitled to relief turns on a reconstruction of the
24 administrative record with respect to enforcement priorities, permitting, and

1 administrative remedies. The Yosemite Compendium facially contradicts Mr.
2 Nunn's position, and the government's opposition relies on procedural requirements
3 underpinned by these facts. Because resolving the motion to dismiss relies heavily
4 on disputed facts, the court should grant an evidentiary hearing. While an
5 evidentiary hearing on a motion to dismiss is rare, it is proper in these
6 circumstances. *See Irwin*, 612 F.2d at 1187 (motion to dismiss indictment); *U.S. v.*
7 *Carrillo-Lopez*, 555 F.Supp.3d 996, 1000 (2021) (evidentiary hearing proper on
8 motion to dismiss alleging the charging statute as unconstitutional).

9 **III. Conclusion**

10 For the forgoing reasons this court should order evidentiary development by
11 means of documentary evidence and live testimony at an evidentiary hearing.

14 Dated this 15 day of February 2023.

15 Respectfully submitted,

16 Rene L. Valladares
17 Federal Public Defender

18 /s/ Benjamin A. Gerson
19 Benjami A. Gerson
20 Assistant Federal Public Defender